



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**ORIGINATING SUMMONS NO. 3 OF 2016**

**IN THE MATTER OF A SHARE OF ESTATE OF THE LATE**

**M'IRUBIU MWITA alias M'RUBIA M'MWITA (DECEASED)**

CIATHARAKA CIANTHUNI.....1ST APPLICANT

PATRICIA CIAMBUBA.....2<sup>ND</sup> APPLICANT

AGNES CIAMBAKA.....3<sup>RD</sup> APPLICANT

- VERSUS -

PASKWALE MUTEGI NTHIIRI.....RESPONDENT

**R U L I N G**

1. By a judgment of this court delivered on 9<sup>th</sup> March 2016, in **Chuka H.C. Succ. Cause No. 57 of 2015** it was decreed that the estate of the late M'Rubia Muita did not have any asset for distribution as the same had been bequeathed to Paskwale Mutegi Nthiiri (*"the Respondent"*) and Daniel Mbaka Charles. That Judgment was arrived at after the Respondent had applied to set aside a grant obtained by his uncle one M'Ndereba M'Iruba. The application for the revocation of the said grant was heard through viva voce evidence.

2. After delivery of the said judgment on 9<sup>th</sup> March, 2016, Patricia Ciambuba, Ciriaka Cianthuni and Agnes Ciambaka (*"the Applicant's"*) took out an Originating Summons on 19th April, 2016 under order 37 Rules 1 (a) and 8 of the Civil Procedure Act. In that Summons the Applicants' sought the determination of the following questions:-

***"a) whether the Applicants are children of the deceased"***

***b) whether the Applicants are dependants within the meaning of section 29 of the Law of Succession Act"***

***c) whether the Applicants are in lawful occupation of the estate of the deceased"***

***d) whether reasonable provision of the deceased estate should be awarded to the Applicants""***

3. The said Summons was filed under a separate cause, independent of **Chuka H.C Succ. Cause No. 57 of 2016** ("*the Succession Cause*"). In his Replying Affidavit the Respondent stated at paragraph 3 as follows:-

**"3. THAT the subject matter on the Applicant's Originating Summons LR KARINGANI/MUIRU/72 was exhaustively determined in Chuka Succession Cause No. 57 of 2015 and the Applicant's were parties or witnesses in the said Succession Cause."**

He thereupon produced a copy of the judgment in the succession cause.

4. On the basis of the foregoing, the court ordered that the parties do address the court as to whether this court has jurisdiction to re-open the matter of the inheritance of the estate of the late M'Iruba Muita through the said originating summons in view of the judgment in the Succession Cause and section 7 of the Civil Procedure Act. The Parties filed their written submissions which the court has considered and this is the ruling on that issue.

5. The Respondent, appearing in person submitted that the Summons is an appeal against the judgment in the succession cause; that this court lacked jurisdiction to entertain the matter as the issues raised therein are resjudicata and that this court will be sitting on appeal or its own judgment if it attempted to determine the Summons.

6. On his part, Mr. Kijaru learned Counsel for the Applicants submitted that this court has jurisdiction under Order 37 of the Civil Procedure Rules and sections 47 and 48 of the Law of Succession Act, Cap 160 Laws of Kenya ("*the Act*") to entertain the matter. Counsel relied on the cases of **Re Estate of Karanja [2002] 2 KLR 34, Re Estate of James Karanja Kioi (deceased) NBI HCSC NO. 1366 OF 1995, Re Estate of Peter Gicheru Kagotho (deceased) NBI HCSC NO. 376 of 1983 and Re Estate of Henry Ng'ang'a NBI HCSC No. 1330 of 1999** as authorities for that proposition. Counsel further submitted that since there was no right of appeal to the Court of Appeal against the judgment of this court by virtue of section 50 of the Act, the only avenue available to the Applicants was to return to this court as they had done. Counsel cited various cases amongst them **Mary Wangui Karanja & Anor. v. Rhoda Wairimu Karanja & Anor [2014] eKLR** in support of that proposition. Mr. Kijaru urged that the Court should proceed to hear and determine the Summons.

7. I am in total agreement with the cases cited by Mr. Kijaru that under Order 37 of the Civil Procedure Rules and sections 47 and 48 of the Act, this court has very wide jurisdiction to entertain applications by deserving litigants and make various orders for the ends of justice. However, such applications can only be made and orders issued within the parameters permitted by law. No doubt, the questions raised in the summons by the Applicants can be determined under a summons properly made under Order 37 of the Civil Procedure Rules. The question to be answered is, can they be determined in the present Summons after this court has already pronounced itself on the very same issues in the said Succession Cause"

8. In its judgment of 9th March, 2016, the court observed, inter alia that:-

**"Having considered the Affidavits on record, the testimonies of the parties and their witnesses and the record in its entirety, the issues for determination in my view are as follows:-**

**a) who are the beneficiaries of the estate of the deceased"**

**b) whether there was any asset of the estate that was left behind to be distributed to the**

**beneficiaries.**

**c) whether there are any grounds to nullify the grant made to the Respondent in Chuka PMCC Succession Cause No. 113 of 2014."**

9. The court then proceeded to make a determination of the said issues.

10. Section 7 of the Civil Procedure Act provides:-

**"(7). No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

Explanation 4 thereof provides:-

**Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."**

11. My view is, where there has been a suit or proceeding which has been determined by a court of competent jurisdiction between the same parties, no subsequent suit or proceeding between such parties can be entertained by any court of concurrent. The jurisdiction law completely bars a court from entertaining such a subsequent suit or proceeding. Simply put, the law denies the court jurisdiction of looking at such a proceeding.

12. In the present matter, the Applicants were listed as beneficiaries in **Chuka PMCC Succession Cause No. 113 of 2014** and had been allocated portions of the suit land. All of them participated as witnesses in the Succession Cause (**Chuka HC Succ. Cause No. 57 of 2015**) in support of their brother M'Ndereba M'Iruba against the Respondent. All the issues raised in the current Summons were conclusively determined in the said judgment. Accordingly, the Applicants cannot seek now to re litigate the very same issues before this court. As to the argument that the Applicants have no right of Appeal by dint of section 50 of the Act, that does not give them nor this court the excuse of circumventing or breaching the clear provisions of Section 7 of the Civil Procedure Act. There has to be an end to litigation.

13. Being of the foregoing opinion, I find that the Originating Summons dated 19<sup>th</sup> April, 2016 is Res-Judicata Chuka H.C Succ. Cause No.57 of 2015. The same is therefore struck out with costs to the Respondent.

**DATED and Delivered at Chuka this 20<sup>th</sup> day of December, 2016.**

**A. MABEYA**

**JUDGE**

Ruling read and delivered in open court in the presence of all the parties.

**A.MABEYA**

## JUDGE



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